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JURISDICTIONAL STATEMENT

The action herein is an Original Petition for Writ of Prohibition, relief on a petition in similar form having been previously denied by the Missouri Court of Appeals, Western District. The question involves Relator's claim that while he was in the custody of the Kansas Department of Corrections, officials of that department failed to "promptly notify" Relator of an outstanding detainer from Clay County, Missouri, as required by Article III, paragraph 3, of Section 217.490, the interstate "Agreement on Detainers". Relief having been denied by the trial court and the Missouri Court of Appeals, this case falls within the general jurisdiction of the Court.

STATEMENT OF FACTS

This proceeding in prohibition is brought and maintained to determine whether Respondent has acted in excess of his jurisdiction and whether the Circuit Court of Clay County, Missouri, has jurisdiction and authority, under law, to continue to maintain Case No. CR199-5085F (hereinafter "5085") in which Relator (defendant therein) is charged with five felony counts, to wit: two counts of Robbery in the Second Degree, one count of Robbery in the First Degree, and two counts of Attempted Robbery in the First Degree. Relator remains in custody pending disposition of this cause in the Clay County Correctional Center.

Attached hereto and incorporated herein by reference are the following:

*Exhibits 1 through 13; Exhibit 15; and Exhibits 20 through 26, carrying the same numbers assigned by the trial court. All these exhibits were received into evidence during the course of hearings on Relator's Motion to Dismiss in Respondent's court.

*Exhibit 27, being a copy of Relator's "Amended Motion to Dismiss Indictment for Violations of Interstate Agreement on Detainers" as filed in the Circuit Court of Clay County on October 22, 2001.

*Exhibit 28, being a copy of the Indictment in Case No CR199-5085F as filed on December 1, 1999.

*Exhibit 29, being copies of pages two through four of a Partial Transcript of Proceedings of May 17, 2002, in which Respondent set forth for the record his

Findings of Fact and Conclusions of Law overruling Realtor's aforesaid Motion to Dismiss.

*Respondent's Exhibit C, as filed with "State's Response to Show Cause Order on Preliminary Writ of Prohibition" on September 9, 2002, being in relevant parts a transcript of the testimony of Lana Houston and Alice Doman, employees of the Kansas Department of Corrections, on April 2, 2002. (NOTE: An additional copy of the transcript is not attached hereto for brevity of the record.)

*Exhibits 30 and 31, being specifically cited portions, pages 40 and 43, respectively, of Exhibit C, incorporated in full above.

*Exhibit 32, being a copy of the Respondent's docket in 5085 from filing to and through May 17, 2002.

On **10/15/99**, a Complaint, in one count, was filed by the Clay County Prosecuting Attorney in Case No. CR199-4474F (hereinafter "4474") alleging one count of Robbery in the Second Degree. On **12/01/99**, an Indictment was filed charging Defendant with five counts of Robbery of various degrees in Case No. CR199-5085F (hereinafter "5085"). See: Exhibit #28. Count I of 5085 charged the same exact offense as that set out in 4474 in apparent violation of Rule 23.10 and Section 545.010, discussed below.

At the time of the filings described above, Defendant was in custody in the Johnson County Correctional Center in Olathe, Kansas. On **02/03/00**, Defendant was delivered to the custody of the Kansas Department of Corrections (hereinafter

"KDOC"). See: Exhibit #3. Prior to this delivery, Clay County authorities sent notice of their detainer in 4474 on **10/15/99**. See: Exhibit #1.

On **02/16/00,** the Clay County Sheriff's Office wrote the KDOC at the Topeka Correctional Center advising them of the warrant for the Defendant in 5085, and asking that the warrant be placed as a detainer. See: Exhibit #20. In response to this request, on **02/18/00**, Defendant received from KDOC a "Detainer Notice" in 5085 describing the charges, in error, as Robbery 2nd Degree and three counts of Robbery 1st Degree. See: Exhibit #4. While these documents establish that KDOC was aware of the detainer in 5085 no later that 02/18/00, the "Detainer Notice" of 02/18/00 failed to meet the requirements of Article III, paragraph 3 of Section 217.490, RSMo, the interstate "Agreement on detainers" (hereinafter "AOD") which requires that the "official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and *shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based."* (Emphasis added) Subsequent testimony by defendant's case worker and the records clerk in charge of the file at KDOC failed to provide any specific suggestion that defendant was advised, even verbally, of his right to request disposition of 5085 as required by Article III, paragraph 3 of the AOD. See generally the testimony of Lana Houston and Alice Doman as reproduced in State's / Respondent's Exhibit C, previously incorporated by reference.

On **02/21/00**, Defendant was delivered from the KDOC reception center in Topeka, Kansas, to the Ellsworth Correctional Center, Ellsworth, Kansas, where he remained during all times mentioned hereinafter, unless specifically indicated to the contrary. See: Exhibit #5.

On **12/19/00**, Defendant was informed of the detainer in 4474 for a second time (See: Exhibit #6), having been originally informed of the warrant in this case by way of a computer "Detainer Record – CM080" on **10/21/99.** See: Exhibit #1. As was the case with the "Detainer Record" previous discussed with reference to case 5085, this document also failed to advise Defendant of his right to request disposition of the detainer as required by the AOD. This second notice was in apparent response to a letter from the Clay County Sheriff's Office of **12/18/00** again requesting that a detainer be lodged against the defendant in 4474. See: Exhibit #20. The 12/18/00 letter from the Clay County Sheriff's Office clearly demonstrates also that Clay County officials were actively pursuing this case more than a year after the subject matter of the Complaint had been charged by Indictment in 5085 on 12/01/99, in violation of Rule 23.10 and Section 545.010.

Concerning the Notice to Defendant on 12/19/00 in case 4474, state's witness Alice Doman, relator's case worker in KDOC, indicated in testimony on April 2, 2002, that she *would have explained verbally* to the inmate (relator / defendant Lybarger) the process to request disposition of the detainer. See: Exhibit #30. In her entry in Lybarger's Chronological File, Exhibit #21, of 12/19/00, she indicated that defendant "signed for detainer CR199004474 from

Clay Co. Missouri will file writ after Xmas". Note should be taken that any notice given was verbal only and that even if it had legal effect, which defendant would suggest is not the case, by the express terms of her entry, she made mention only of 4474. On Cross-Examination, witness Doman confirmed that verbal mention of rights was made only with reference to CR199-4474F. See: Exhibit #31. Regarding the Chronological File (See: Exhibit #21), it should also be noted that on **12/27/00** a similar notice, without advise of the right to request disposition, was presented to defendant with regard to Jackson County Case No. CR1999-06592.

On **02/18/01**, the one year anniversary of the "Detainer Notice" in 5085 (See: Exhibit #4), discussed above, passed without any additional activity concerning 5085. The evidence fails to disclose that defendant had been advised, in writing (as defendant would suggest is required) of his right to request disposition of either of the detainers, 4474 or 5085. The evidence also failed to disclose that defendant had even been advised verbally of his right to request disposition of 5085, regardless of its effect or lack thereof. It should also be noted that defendant remained charged twice with the same offense in 4474 and Count I of 5085.

On **02/21/01**, defendant sent to the records department at KDOC, and particularly to records clerk Lana Houston, an "Inmate Request to Staff Member" on Form 9 (See: Exhibit #22) indicating in part: "I would like to file 180 day Disposition of Detainers writ on Clay and Jackson Counties in the state of

Missouri." No indication of any particular case was made; to the contrary, defendant's clear request was for disposition of all detainers which KDOC had on record from those counties.

On **02/23/01**, one year and twenty days after defendant's delivery to KDOC, defendant was given notice of detainer and of his right to request disposition of this detainer (Kansas Form I) which satisfied the requirements of Article III, paragraph 3 of the AOD. (See: Exhibit #7) This notice made mention only of 4474 and stated in part that "the following (CR199-004474F) are the untried indictments, information or complaints against you concerning which the undersigned has knowledge, and the source and contents of each . . ." Based upon this notice, it is suggested that defendant could reasonably assume that only 4474 remained as a detainer and that he would face only this single charge when he requested disposition of this detainer (See: Exhibit #8) on **02/23/01** and effectively waived extradition proceedings in 4474.

Note should be taken that the initial Offer To Deliver Temporary Custody / Kansas Form IV (See: Exhibit #25) was in error, being addressed to Jackson County Prosecuting Attorney Clair McCaskill, and that defendant, in an effort to see that this procedure was followed correctly, advised Lana Houston in records of this fact by "Inmate Request to Staff Member" (See: Exhibit #23) on **02/26/01** and by return endorsement to this Form 9, Ms. Houston informed defendant that a corrected Form IV had been sent to Clay County on **02/28/01**, addressed to Mr. Donald Norris (See: Exhibit #10).

Note should also be taken that the court's docket in 5085, by an entry on 02/28/01, indicates that the defendant filed request for disposition of indictments, information or complaints. See: Exhibit #32. This was applicable to 4474 only, and was apparently filed in 5085 in error as defendant had executed no such request in 5085 as of that date, and never did. .

On **02/28/01**, the Clay County Prosecuting Attorney filed his Nolle Pros dismissing 4474. On **03/01/01**, defendant was advised that the detainer in 4474 had been canceled (See: Exhibit #11) . At this point, defendant could reasonably have operated under the assumption that all detainers in Clay County were resolved.

On **03/02/01**, in 4474, the Clay County Prosecuting Attorney indicated his acceptance of temporary custody by way of Agreement on Detainers Form VII See: Exhibit #12. This acceptance of temporary custody was signed by Assistant Prosecuting Attorney Janet Sutton and certified by the Respondent. Relator would note that this was done in spite of the fact that 4474 had been dismissed on 02/28/01.

On **03/05/01**, some one year and eighteen days after KDOC was advised of the detainer in 5085 on **02/16/00** (See: Exhibit #20), Kansas officials properly advised defendant both of the fact of the detainer in 5085 and of the fact that he had the right to request disposition of this detainer. See: Exhibit #13. Up to this date, defendant certainly had not been advised in writing of his right to request disposition of the 5085 detainer. Further, case worker Alice Doman's

Chronological File (See: Exhibit #21), by omission of any reference to 5085 prior to 03/05/01, clearly shows that verbal notice of defendant's right to request disposition of this warrant and detainer was not given to defendant during this period (regardless of the effect such verbal notice might or might not have had). Her testimony of April 2, 2002, (See: Exhibit C) reinforced the conclusion that no notice of right to request disposition of the 5085 detainer, either in writing or verbally, was given to defendant at any time between 02/16/00 and 03/05/01.

On **04/04/01,** Defendant was transported to Clay County on the basis of the Prosecutor's Acceptance of Temporary Custody of **03/02/01** (See: Exhibit #12) which clearly was applicable only to 4474 – which had been dismissed on **02/28/01**. On **04/05/01** defendant was arraigned in 5085 and all other proceedings in Respondent's Court have been had in that case in spite of the fact that defendant never requested disposition of that detainer; was never given the right to contest extradition or the opportunity to waive it; and the State never requested nor received authorization to transport defendant from Kansas to Missouri for the purpose of trying defendant on the charges set forth in 5085, the case currently at bar in Respondent's court.

On **10/22/01,** by his attorney of record as of that date, Relator / Defendant Lybarger filed his "Amended Motion to Dismiss Indictment for Violations of Interstate Agreement on Detainers". See: Exhibit #27. Following several hearings on the Motion, the Respondent denied the same on **05/17/02**. See: Exhibit #29

On **06/04/02,** Relator filed a Petition for Writ of Prohibition in similar form to the Petition before the court in the Missouri Court of Appeals, Western District, in Case No. WD61467. On **06/24/02**, the Western District denied the request without opinion. The Petition before this Court followed.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITY

CASES

STATUTES

1. Sections 217.450 to 217.485, RSMo (inclusive) at: pp.16,19,20,24
2. Section 217.490, RSMo at: p.16
    a. Article I at: pp.17,25,28
    b. Article III, paragraph 3 at: pp.5,8,18,20,21,24,25
    c. Article III, paragraph 4 at: p.28
    d. Article IV at: p.25,29
    e. Article V, paragraph 3 at: p.18
3. Section 545.010, RSMo at: pp.4,6,27

SUPREME COURT RULES

1. Supreme Court Rule 23.10 at: pp.4,6,27

POINTS RELIED ON

1. Relator is entitled to an order prohibiting Respondent from taking any further action in *State of Missouri vs. James L. Lybarger*, Case No. CR199-5085F now pending in the Circuit Court of Clay County, Missouri because of the failure of responsible officials to "promptly inform" Relator of a pending detainer herein as required by the Agreement on Detainers (Section 217.490 RSMo), in that the Relator was in the custody of the Kansas Department of Corrections at the time of the filing of the Indictment in the case at bar and at the time of the forwarding of a detainer regarding the same to the State of Kansas; further, that the responsible officials of the Kansas Department of Corrections failed to notify Relator for over one year of the existence of the detainer and of his right to request disposition of the same under the interstate Agreement of Detainers, cited above; further, that said failure requires dismissal of the Indictment for failure of jurisdiction, which Respondent has failed to do.

a. *State ex rel. Kemp vs. Hodge*, 629 SW2d 353 (MoBanc 1982)

b. *State vs. Thomas*, 972 SW2d 309 (MoApp WD 1998)

c. *Romans, Jr. vs. The District Court in and for the Eighth District of the State of Colorado, et al*., 633 P2d 477 (Colo 1981)

d. *State vs. Walton*, 734 SW2d 502 (MoBanc 1987)

e. Section 217.490, RSMo

f. Sections 217.450 to 217.485, inclusive

2. Relator is entitled to an order prohibiting Respondent from taking further action as to Count I in the case of State vs. Lybarger, Case No. CR199-5085F in the Circuit Court of Clay County, Missouri because the filing of said Count I in Division 1 of the Circuit Court of Clay County, Missouri, was in violation of Section 545.010 RSMo and Supreme Court Rule 23.10, in that said Count I was filed in Division 1 of the Circuit Court of Clay County, Missouri on 12/01/99 at which time the alleged facts were pending as the sole count in Case No. CR199-4474F in Division VI of said court, as the same was filed by Affidavit of Complaint on 10/15/99, all in violation of statute and court rule cited above.

a. Section 545.010 RSMo

b. Section 217.450, Article III, paragraph 4, RSMo

c. Supreme Court Rule 23.10

ARGUMENT

1. Relator is entitled to an order prohibiting Respondent from taking any further action in *State of Missouri vs. James L. Lybarger,* Case No. CR199-5085F now pending in the Circuit Court of Clay County, Missouri because of the failure of responsible officials to "promptly inform" Relator of a pending detainer herein as required by the Agreement on Detainers (Section 217.490 RSMo), in that the Relator was in the custody of the Kansas Department of Corrections at the time of the filing of the Indictment in the case at bar and at the time of the forwarding of a detainer regarding the same to the State of Kansas; further, that the responsible officials of the Kansas Department of Corrections failed to notify Relator for over one year of the existence of the detainer and of his right to request disposition of the same under the interstate Agreement of Detainers, cited above; further, that said failure requires dismissal of the Indictment for failure of jurisdiction, which Respondent has failed to do.

Purpose of the statutes in question: Resolution of the Relator's Amended Motion to Dismiss Indictment for Violations of Interstate Agreement on Detainers turns not only on the interpretation and application of the Agreement on Detainers, Section 217.490 RSMo (hereinafter "AOD"), but also on the guidance of the Uniform Mandatory Disposition of Detainer Act, Sections 217,450 to 217.485, RSMo, inclusive (hereinafter "UMDDA")

The reasons for and the purpose of these acts was explored in depth by Judge Seiler in *State ex rel. Kemp vs. Hodge*, 629 SW2d 353 (Mo. Banc 1982). The general thinking as expressed in that case is that a pending detainer is "corrosive" of efforts at rehabilitation and that the best interests of both the inmate and the penal system are served if these detainers are dealt with quickly and in a predictable manner. The policy and purpose of the AOD were set out by the legislature in the statute at Article I: "Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints."

The AOD and the UMDDA should be read in pari materia: It is well settled that compatible sections of these statutes, the AOD and the UMDDA, are to be construed in harmony. They are in pari material. *Murphy vs. State*, 777 SW2d 636 (MoApp, WD 1989). "When two statutes embody identical policies, the principles of one may be applied to the other." *People v. Lewis*, 680 P2d 226, 229 (Colo 1984), cited with approval in *Murphy vs. State*, cited above. "The agreement (the AOD) is to be construed in harmony with the Uniform Mandatory Disposition of Detainers Act," *State vs. Smith*, 686 SW2d 543 (MoApp, 1985). In *State ex rel. Kemp vs. Hodge*, cited above, this Court held: " . . . we should apply a rule of statutory construction which proceeds upon the supposition . . . (that these statutes) were governed by one spirit and policy and were intended to be

consistent and harmonious in their several parts and provisions." See also: *State vs. Leady,* 879 SW2d 644 (MoApp WD 1994).

Article III, paragraph 1 of the AOD provides as follows: "Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; . . ." Article V, paragraph 3 requires dismissal with prejudice upon failure of the prosecuting officer to bring the case to trial within the time limits of the act. Sections 217.450.1 and 217.460 contain parallel provisions, reflecting the "one spirit and policy" of these two acts. *State ex rel. Kemp vs. Hodge,* cited above.

Similarly, Article III, paragraph 3 of the AOD sets out the duty of the penal authorities in the "sending state" when they receive a detainer from a "receiving state": "The warden, director of the division of adult institutions or other official having custody of the prisoner **shall promptly inform him** (emphasis added) of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment,

information or complaint on which the detainer is based." The purpose of this two part directive is obvious – knowledge of the detainer is of no value to the prisoner unless he is also made aware of the steps he can take to address it. The UMDDA again contains parallel provisions at Section 217.450.2. The UMDDA continues at Section 217.450.3, setting out a maximum period of one year which will constitute a "prompt" performance of this duty of notification by the official in the "sending state". Relator suggests that the dictate of *State ex rel. Kemp vs. Hodge*, cited above, must again be followed, to wit: to read these statutes in pari materia, applying "a rule of statutory construction which proceeds upon the supposition . . . (that these statutes) were governed by one spirit and policy and were intended to be consistent and harmonious in their several parts and provisions." Relator suggests that while a number of other states in examining the requirement for notification of the detainer have found delays of much less than one year failed the test of promptness, reading these statutes in harmony requires as a **maximum** (and not as a **minimum** as suggested in *State vs. Reynolds*, 813 SW2d 324 (MoApp ED 1991)) that the prisoner be notified of a pending detainer within one year; which is to say, that the term "promptly inform" as used in Article III, paragraph 3 of the AOD should be given the same meaning as the identical term in Section 217.450.2: a **maximum** of one year (Section 217.450.3).

The validity of this assertion was recognized in Missouri by the Western District of the Court of Appeals in *State vs. Thomas*, 972 SW2d 309 (MoApp WD

1998). While finding that one year had not elapsed in Mr. Thomas's case, in which the State of Kansas was the "sending state" as it is in the case at bar, and Thomas was not, for that reason, entitled to relief, the Western District, on facts very similar to the case at bar, except for the period of delay in question being over one year, held: "As established in *Leady* (*State vs. Leady*, 879 SW2d 644 (MoApp 1994)) the filing of the detainer triggered the one year notice requirement of Section 217.450. Mr. Thomas, therefore, would have been entitled to a final dismissal (in this case under the AOL) of the information with prejudice if he had not received notice of the detainer within one year from the date the detainer was filed with the Kansas correctional facility."

The same principle, that these statutes should be read in pari materia, applies to the argument set forth by the State in the trial court and the Court of Appeals, and apparently accepted by Respondent – that verbal notice of the detainer and the right to request disposition of that detainer is sufficient. The UMDDA at sections 217.450.2 and 217.475 expressly requires that the director of a correctional facility give notice of a pending detainer **in writing.** Taking the notice sections of the two uniform acts in pari materia, as discussed above, one cannot escape the conclusion that the notice required by Article III, paragraph 3 of the AOL must be in writing, as required of the notice provided for in Section 217.450.2 of the UMDDA. Even assuming, *arguendo*, which Relator would deny, that oral notice of defendant's right to request disposition of the detainer in 5085 was sufficient, the testimony of Alice Doman, Relator's caseworker in KDOC

(See: Respondent's Exhibit C), made clear that no such notice specifically directed to or even mentioning 5085 was given to Relator prior to March 5, 2001, in writing or otherwise.

As a matter of policy, one can envision the temptation that would be presented to the negligent corrections official who had failed to convey notice of an outstanding detainer. He or she would need only claim that the notice had been given, in full and as required, verbally and the injured inmate would effectively have no redress though in actuality notice might not have been given at all, or might have been incomplete or incorrect. Only the logical requirement that the notice must be in writing, a very simple matter, can forestall this possibility.

In weighing both of these issues, note should be taken of the admonition of the Southern District in *State vs. Smith,* 686 SW2d 543 (MoApp 1985). The Court, in a case under the AOD stated: "A violation of the agreement is not a mere technical error. Citing authority. The agreement is to be construed in favor of the prisoner." See also: *State ex rel. Hammett vs. McKenzie,"* 596 SW2d 53 (MoApp 1980).

The failure of penal authorities in Kansas to promptly inform Relator of his right to request disposition of the detainer in the case at bar, as required by Article III, paragraph 3 of the AOD within a maximum period of one year requires dismissal of this case with prejudice: The AOD at Article III, paragraph 3, as previously noted, requires that a warden holding an inmate "shall promptly inform him of the source and contents of any detainer lodged against him and shall also

inform him of his right to make a request for final disposition of the indictment, . .” Since earlier written arguments and suggestions submitted by the parties would seem to be in agreement that this question is one of first impression in Missouri, Relator would suggest that the best guidance as to the proper path to follow can be found in the Colorado Supreme Court case of *Romans, Jr. vs. The District Court in and for the Eighth Judicial District of the State of Colorado, et al.*, 633 P2d 477 (Colo 1981). In *Romans,* the inmate was in federal penal custody. Federal officials were holding a detainer from the State of Colorado. These officials failed to give defendant Romans “actual notice” of this detainer for a period of fifty six (56) days. The Colorado Supreme Court held that the Romans case should be dismissed with prejudice. In so ruling, the Court stated: “The provisions of Article III (c) – Missouri paragraph 3 – are mandatory. Citing authority. The fifty-six (56) day delay in informing the defendant of the detainer lodged against him was not in compliance with the statutory mandate that he be promptly informed of the source and content of the detainer. In addition, he was never informed of his right to make a request for the final disposition of the indictment, information, or complaint. **Compliance with the Agreement is a prerequisite to jurisdiction**. (Emphasis added) Citing authority. Furthermore, there is no requirement in the Agreement that the prisoner demonstrate that he was prejudiced by the failure of corrections officials to comply with the provisions of the act.” Citing authority.

The Court continued: "The Agreement does not provide an express sanction for failure to comply with the provisions of Article III (c). However, we agree with the Colorado Court of Appeals' holding in *People vs. Lincoln*, 42 Colo. App. 512, 601 P.2d 641 (1979), that the proper sanction for failure to comply with the mandatory provisions of the Agreement is dismissal of the claims with prejudice. The duty to inform the prisoner under Article III (c) is a necessary concomitant to the effective operation of the Agreement." Citing authority. The Court concluded: "We hold that when officials of the state imprisoning the defendant do not comply with the mandates of Article III (c), the indictments, informations, or charges against the defendant pending in the jurisdiction from which the detainer emanates shall be dismissed with prejudice."

The Western District of Missouri, in *State vs. Thomas*, cited and discussed above, appears to have accepted the reasoning of the *Romans* case, though it was not cited. In dictum, the court stated that a delay in notification of over one year would have entitled the defendant in that case to dismissal with prejudice.

Likewise, the Southern District in *State vs. Smith*, cited above, recognized the holding in *Romans*, while also noting contrary rulings from other states.

In suggesting to the Court the guidance of *Romans*, Relator is not unmindful of later Colorado case law which eroded the better position originally taken by the Colorado Supreme Court in that case (See: People vs. Higinbotham, 712 P2d 993 (Colo 1986) holding that a delay in notification by the sending state of forty-two days violated the requirement of prompt notification, and that the

notification statute, our Article III, paragraph 3, required dismissal, "*unless* the prosecution demonstrates that prejudice to the defendant did not result from the violation.") or of cases in other states suggesting that Article III, paragraph 3 is directory only and that failure of the "sending state" to properly fulfill its obligation to give notice to an inmate of a detainer and of his right to request disposition of the detainer does not necessarily require dismissal of the case. (See: *State vs. Estes*, 883 P2d 1335 (Or.App. 1994), relied upon by the Respondent at hearing on Relator's Motion to Dismiss; *Commonwealth vs. Gonce*, 466 A2d 1039 (Pa.Super. 1983); *Coit vs. State*, 440 So2d 409 (Fla.App. 1983); and *State vs. Clark*, 563 P2d 1028 (Kansas 1977))

Relator would respectfully suggest that the rule of *Romans*, regardless of other cases, should, in this case of first impression in Missouri, be adopted. While no maximum time for "prompt" notification has been suggested in any of these cases, a common sense reading of the word "prompt" would require that thinking such as that in *Reynolds*, cited above, be rejected and as a maximum that the one year requirement of Section 217.450.3 should be imposed. As to the proper sanction for violation, the logic of *Romans*, that failure to satisfy the notice requirement in a prompt manner requires dismissal for a failure of jurisdiction, is compelling. To do otherwise suggests that the authors of the Uniform Act and the Missouri Legislature, in producing a statute whose express purpose is to facilitate quick and orderly disposition of interstate detainers, established a requirement for notification to an incarcerated person (who has no other means of acquiring the

information and which necessitates only the production of a one page form by prison officials) but then thought it so unimportant that its violation would carry no consequences protective of the rights of the inmate. Such simply could not have been the intended outcome.

The Clay County Prosecuting Attorney, in responding for Judge Maloney, and courts in other states have argued for the view that violation of the notification requirement of Article III, paragraph 3 should have no adverse impact upon their case or that case will be left open to failure due to neglect of officials in another state. First, it should be noted that this is the design of the Act. Should the legislature have intended otherwise, certainly a different provision for notification could have been set out. Secondly, nothing in the act prevents the receiving state's prosecuting attorney from taking the simple step of contacting the prison officials in the sending state to periodically check on the status of the notification, so as to protect their case as the real party in interest. Finally, a prosecuting attorney feeling at risk due to the manner in which a detainer is being handled in a sending state need only turn to the provisions of Article IV of the AOD, which provides for the initiation of the transfer of custody for the purpose of trial by the charging prosecuting attorney.

When the potential damage to the incarcerated inmate, and to the policy set forth in Article I of the AOD, from a requirement of notification which carries no consequences for its violation is considered as against a meaningful sanction for violation of that notice requirement, which can be correctly accomplished with

such relative ease by penal and prosecuting authorities, the wisdom of the *Romans* rule seems apparent. This court would seem to have endorsed this general line of thought in *State vs. Walton*, 734 SW2d 502 (MoBanc 1987), wherein Judge Donnelly wrote: "It is the scheme of the Agreement, as it has been construed by the courts, to place the onus of compliance upon the officials of the incarcerating and receiving states, rather than upon the prisoner. The officials are generally in a better position to advance the case and to secure cooperation from each other than is the prisoner." Citing other authority. See also: *In the Matter of the Application of Alan Ekis*, 539 P2d 16 (Kansas 1975) wherein that court stated: " . . . where a prisoner made known to the officials his intent to proceed under the Agreement, their subsequent failure to comply with the act could not frustrate his rights. The burden of their failure was visited, and rightly so, on the prosecution." The same could, and should be said of the failure of incarcerating officials to take the simple act of notifying an inmate of a detainer in a prompt fashion. Finally, note should be taken of the statement of principle in *McBride vs. United States*, 393 A2d 123 (Dist of Columbia Court of Appeals 1978). Quoting the Supreme Court of Delaware, the District of Columbia Court stated: "The burden of compliance with the procedural requirements of the IAD (or AOD) rests upon the party states and their agents; the prisoner, who is to benefit from this statute, is not to be held accountable for official administrative errors which deprive him of that benefit."

2. Relator is entitled to an order prohibiting Respondent from taking further action to Count I in the case of State vs. Lybarger, Case No. CR199-

5085F in the Circuit Court of Clay County, Missouri because the filing of said Count I in Division I of the Circuit Court of Clay County, Missouri, was in violation of Section 545.010 RSMo and Supreme Court Rule 23.10, in that said Count I was filed in Division I of the Circuit Court of Clay County, Missouri on 12/01/99 at which time the alleged facts were pending as the sole count in Case No. CR199-4474F in Division VI of said court, as the same was filed by Affidavit of Complaint on 10/15/99, all in violation of statute and court rule cited above.

Supreme Court Rule 23.10 provides: "If a criminal proceeding is commenced in a court having jurisdiction thereof, no other action for the same offense shall be commenced in another court so long as the criminal proceedings first commenced is pending." To the same effect, see: Section 545.010 RSMo.

On 10/15/99, the Clay County Prosecuting Attorney filed an Affidavit of Complaint charging Defendant Lybarger with a single count of Robbery in the Second Degree in Case No. CR199-4474F. While that case remained pending in Associate Division 6 of the Clay County Circuit Court, without any action having been taken upon the Complaint, on 12/01/99 an Indictment was filed in Division 1 of the court in five counts in Case No. CR199-5085F. Count I of that Indictment was in all respects identical to the charge set out in CR199-4474F.

Count I of 5085 stated the exact same charge as that set out in the existing Complaint in 4474 in violation of Rule 23.10 and Section 545.010. Count I should

not have been filed and was void from its inception for violation of the aforesaid Rule and Statute.

Additionally, the AOD at Article III, paragraph 4, contemplates only one resolution when a receiving state accepts an out of state inmate for the purpose of prosecuting an outstanding warrant or detainer: "final disposition". Clay County accepted custody of the Relator on the basis of a Request for Temporary Custody in CR199-4474F, the Complaint case, even though the case had been dismissed by the State prior to the time of such acceptance. Once Clay County took custody of the defendant in 4474 (the merits of any argument concerning the validity of the case in 5085 not withstanding), only one option was open to the state – trial, and the State, by its own action of dismissal, had foreclosed that option. On dismissal, or return of the defendant to Kansas without "final disposition", further prosecution was barred under the AOD. The State cannot be allowed to escape this fact by simply proceeding with the same case under a different number (which should not have proceeded from its inception).

SUMMARY

Both the States of Missouri and Kansas have adopted the interstate Agreement on Detainers. The stated policy of that Act as set out in Article I is "to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried

indictments, informations or complaints". The Clay County prosecuting attorney properly filed detainers with the Kansas Department of Corrections concerning both the Complaint and Indictment pending in Missouri. From that point on, virtually nothing was done properly. Notification of the Indictment and of the right of Relator to request disposition of that indictment was not given, in writing, as "orderly disposition" would require, for a period of one year and fifteen days. Two basic issues are presented: 1) Was this notification "prompt", and 2) if not, what is the proper sanction.

Relator would respectfully suggest that only a reading of the statute most forgiving of the neglect of penal official in Kansas and prosecutors in Missouri who failed to inquire as to the status of the matter or initiate return as authorized by Article IV of the Act would find notification after such a delay, where that notification is such a simple process, to be prompt. As suggested, the far reaches of what would constitute "prompt' notification should be the time limit of the UMDDA -- one year.

Assuming that the notification requirement was in deed violated, the only meaningful sanction is dismissal for lack of jurisdiction. To accept the reasoning of the line of cases to the contrary is to effectively allow penal officials by negligence or intent to negate the protections accorded inmates under the statute by simply failing to deliver the proper notice in a timely manner. As the *Walton* court properly opined: "It is the scheme of the Agreement . . . to place the onus of compliance upon the officials of the incarcerating and receiving states, rather

than upon the prisoner. The officials are generally in a better position to advance the case and to secure cooperation from each other than is the prisoner."

Respectfully submitted

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CERTIFICATE UNDER SPECIAL RULE NO. 1, RULE 84.06

Undersigned Attorney for Relator hereby certifies, as required by Special Rule No. 1, Rule 84.06 the foregoing Brief and Argument, submitted by Relator:

1. Includes the information required by Rule 55.03

2. Complies with the limitations contained in Special Rule No 1 (b).

3. Contains 6,754 words, in total

Further, undersigned Attorney for Relator hereby certifies, as required by Special Rule No. 1 (f), that the floppy disk filed herewith, containing the Relator's Brief and Argument in full, is fully compliant with the requirements of said Rule. Specifically, that the disk is IBM-PC-compatible 1.44 MB, 3 1/2 –inch size and that it is, to the undersigned's best knowledge and belief, virus-free.

_____

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